

Formal Response to the Law Commission’s

Second Consultation Paper on the Review of the Arbitration Act 1996

by Members of Brick Court Chambers

together with Lord Mance, Sir Bernard Rix and Ricky Diwan KC

(A) Introduction and proposed reform

1. This is a formal response to the Law Commission’s Second Consultation Paper on the Review of the Arbitration Act 1996 (“the Consultation Paper”) submitted on behalf of Lord Hoffmann, Lord Phillips, Sir Richard Aikens, Sir Christopher Clarke, Hilary Heilbron KC, Vernon Flynn KC, Salim Moollan KC, Kyle Lawson, Zahra Al-Rikabi, Emilie Gonin, Jessie Ingle, Allan Cerim and Andris Rudzitis of Brick Court Chambers, together with Lord Mance, Sir Bernard Rix and Ricky Diwan KC and with the further members of Brick Court Chambers listed in Annex 1.

2. As with our response to the Law Commission’s First Consultation Paper (“our First Response”), which this Second Response should be read with, it does not engage with each and every question raised by the Consultation Paper. It focuses instead on the three related issues of jurisdiction and applicable law which were addressed in our First Response, and which are addressed in the Second Consultation Paper as follows:
 - (a) Challenges to the jurisdiction under Section 67 of the Arbitration Act (“the Act”): Chapter 3 of the Second Consultation Paper and Consultation Questions 2 and 3;

 - (b) The rationalisation of the multiple avenues of challenge to the jurisdiction which currently coexist under sections 9, 32, 67 and 72(1) of the Act: Chapter 3 of the Second Consultation Paper, proposal formulated in our First Response declined in paragraphs 3.66 to 3.85 the Second Consultation Paper;

- (c) Applicable law of the arbitration agreement: Chapter 2 of the Second Consultation Paper and Consultation Question 1.

3. Each of these issues is considered in turn below. In summary:

- (a) We respectfully disagree with the Law Commission’s revised proposal in relation to s. 67. We agree with the Law Commission’s amended conclusion that section 67 itself need not be revised, but do not agree that rules of court should be introduced to frame how challenges under section 67 should be heard by the courts. The proposed constraints are unwarranted as a matter of principle, and the courts already possess (and are using) the case management powers to ensure a fair and efficient hearing of s. 67 applications in a manner tailored to each case. The proposed rules of court would replace that necessary flexibility with a straightjacket and are in fact more likely to create delay and extra costs than to avert the same. Our answers to Consultation Questions 2 and 3 are accordingly No and No.
- (b) As we explained in Part C of our First Response, it is our respectful view,¹ that the issues of potential waste of time and costs identified by the Law Commission would best be addressed by rationalising the avenues of challenge to jurisdiction under the Act in the following way: (i) amending sections 9(1) and 9(4) to align the position in England and Wales with the position of all leading Model Law jurisdictions (including Singapore, Hong Kong and Canada) and avoid a full determination of issues of jurisdiction when a party seeks a stay of Court proceedings in favour of arbitration; (ii) abrogating section 32; (iii) abrogating section 72(1). The Law Commission considers these issues at paragraphs 3.66 to 3.85 of the Second Consultation Paper and does not adopt those proposals. In our respectful submission, this would be a huge opportunity missed to make England and Wales a more competitive seat for international arbitration, and to send a powerful signal to international users (especially when coupled with the important proposed reform on applicable law now made by the Law Commission) that our jurisdiction’s disposition is firmly *in favorem arbitrii*.

¹ As noted in our First Response, this part of our Response does not include Lord Mance.

- (c) We are grateful to the Law Commission for having listened to the representations made formally in our First Response (and informally before that in other fora), and by numerous other consultees, regarding the law applicable to the arbitration agreement. For the reasons set out in our First Response, our answer to Consultation Question 1 is Yes.

(B) Consultation Questions 2 and 3: Challenging Jurisdiction under Section 67

- 4. In relation to s.67, the Law Commission’s revised proposal, as set out in Chapter 3 of the Second Consultation Paper is that there should be no reform of s.67 itself, but that certain “rules of court” should be amended to make it clear that, in cases where the party seeking to challenge an award under s.67 has already participated in the underlying arbitration, and objected to the jurisdiction of the tribunal, then:
 - (a) The court should allow the challenge if the decision of the tribunal was wrong.
 - (b) The court should not entertain any new grounds of objection, or any new evidence, unless with reasonable diligence the grounds could not have been advanced, or the evidence submitted, before the tribunal.
 - (c) Evidence should not be reheard, save exceptionally in the interests of justice.
- 5. In contrast, in cases where the party bringing the s.67 challenge has not participated in the arbitration, no equivalent reform is proposed. Similarly, no equivalent reform is proposed in cases where a party seeks to resist the enforcement of a foreign award under s.103 on jurisdictional grounds. In such cases, the Law Commission appears to consider that the court should adopt a different procedure, or at least, that it should not be subject to any additional restrictions in deciding how best to conduct the case.
- 6. We welcome the Law Commission’s recognition that it is unnecessary to propose any statutory reform of s.67 itself. We agree with this, for the reasons we set out at §§7-27 of our First Response.

7. We also welcome the Law Commission’s decision not to pursue its original proposal, that a challenge under s.67 should proceed as an appeal, rather than a re-hearing.
8. The Law Commission’s revised proposal, which would involve a more limited reform of certain “rules of court”, is along similar lines to the alternative proposal which we suggested at §24 of our First Response, namely that, instead of amending s.67 itself, CPR r. 62.10 or Practice Direction 62 could be amended to make it clear that:

“In determining the procedure to be adopted for any [re]hearing under Section 67, the Court should take account of the extent to which the party opposing jurisdiction participated and had the opportunity to adduce evidence and the nature of the jurisdictional challenge and such other matters as the Court deems appropriate”.

9. However, as we also explained, our view was that even that limited reform was unnecessary. That remains our view. We are not persuaded that the revised reform proposals in the Second Consultation Paper are necessary. Indeed, our view is that such reform (which would introduce rigid constraints on the courts’ management powers absent from the wording we had proposed and which is quoted immediately above) would be undesirable, and that it would have a number of adverse and unintended consequences. In particular, the proposals would introduce unnecessary rigidity in an area where the courts need – and have already been exercising – flexibility to best manage each case on its own facts using their existing case management powers.
10. We have eight main concerns about the Law Commission’s revised proposals, which we identify below.
11. **First**, one of the main drivers of the Law Commission’s reform proposals appears to be a concern that factual or expert evidence should not be re-heard. We do not agree that the Law Commission should be concerned about this. As a matter of principle, if factual or expert evidence is relevant to the question of whether the tribunal had jurisdiction (for example, where there is a dispute as to whether there was a valid arbitration agreement or not), then there is, in our view, nothing wrong or objectionable about such evidence being reheard. If the Tribunal erred in its understanding or evaluation of the evidence,

then the court should be in a position to consider the evidence afresh, in order to decide whether the Tribunal had jurisdiction.

12. **Second**, the Law Commission's attempts to distinguish *Dallah* and *Azov Shipping* are, with respect, unpersuasive. It should be acknowledged that the Law Commission's reform proposals (even in their revised form) would represent departure from (or at least a curtailment of) the approach that was endorsed in both of these (seminal) decisions:

(a) The Law Commission says that *Dallah* can be distinguished because it was a decision under s.103 (not s.67). That is, with respect, a technical distinction with no substantive merit, and which fails to engage either with the substance of the Supreme Court's reasoning, or the subsequent impact of the decision on the development of the law. Although, technically speaking, *Dallah* was a decision under s.103, the Supreme Court nevertheless addressed the standard of review under s.67. Thus:²

(i) Lord Mance said at [26] that: "*Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under section 67 of the Arbitration Act 1996, just as he would be entitled under section 72 if he had taken no part before the arbitrator*".

(ii) Lord Collins said at [96] that: "*The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act*". Lord Collins also went on to say that the decision of Rix J in *Azov Shipping*

² In the Court of Appeal in *Dallah*, Moore-Bick LJ had likewise noted at [21] that "*the courts have consistently held that proceedings challenging the jurisdiction of an arbitral tribunal under section 67 of the Arbitration Act 1996 involve a full rehearing of the issues and not merely a review of the arbitrators' own decision*".

(which was concerned with the appropriate standard of review under s.67, not s.103) was “*plainly right*” (as to which, see further below).

- (b) The fact that the above observations were made in the context of a s.103 application (and so, strictly speaking, *obiter* regarding the position on s. 67 applications) does not detract from their importance in the present context, the point at issue here being precisely whether there is a valid basis for distinguishing between the regimes under s.103 and s.67. What is more, subsequent decisions (both in England and in other jurisdictions³) have, unsurprisingly, taken *Dallah* as determining the standard of review to be applied under both s.103 and s.67. This was recognised (most recently) by the Court of Appeal in *Newcastle Express*, where Males LJ said at [14] that:

“... a section 67 challenge involves a rehearing (and not merely a review) of the issue of jurisdiction, so that the court must decide that issue for itself. It is not confined to a review of the arbitrators' reasoning, but effectively starts again. That approach was confirmed by the Supreme Court in *Dallah* ...”

- (c) The Law Commission has itself acknowledged that this is the case at §3.123 of the Second Consultation Paper, where it is (rightly) accepted that “*there is a weight of first instance decisions which cite Dallah to hold that section 67 involves a full rehearing*”.⁴ As noted above, this in fact extends to the Court of Appeal.
- (d) In any event, as we explain at §16 below, there is no justification, as a matter of principle, for adopting a different approach as between the standard of review or procedure to be adopted for challenges to jurisdiction under s.67 and s.103.
- (e) There are no grounds at all for distinguishing *Azov Shipping*, given that that was a decision under s.67 (not s.103). Indeed, in that case, Rix LJ made precisely the

³ See our First Response at §11.

⁴ Citing *Kyrgyz Republic v Stand Energy Corp* [2017] EWHC 2539 (Comm), [2018] 1 Lloyd's Rep 66; *GPF GP Sarl v Republic of Poland* [2018] EWHC 409 (Comm), [2018] 1 Lloyd's Rep 410; *LLC Agronefteprodukt v Ameropa AG* [2021] EWHC 3474 (Comm), [2022] 1 Lloyd's Rep 388 at [30]; and *Gol Linhas Aereas SA v Matlinpatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21, [2022] 2 Lloyd's Rep 169 at [42].

point identified at §11 above, that “*where ... there are substantial issues of fact as to whether a party has made the relevant agreement in the first place, then it seems to me that, even if there has already been a full hearing before the arbitrators, the court, upon challenge under s.67, should not be placed in a worse position than the arbitrator for the purposes of that challenge*”.

13. **Third**, in other cases (for example, where there is a pure issue of law as to the interpretation of the arbitration agreement), the Court can already use its case management powers to limit or prevent a rehearing of witness evidence if such evidence would be unnecessary or irrelevant (as will often be the case): see e.g. *X v Y* [2015] EWHC 395 (Comm) at [66], where Teare J held that it did not follow from the Supreme Court’s decision in *Dallah* that “... a party is entitled to a full judicial determination of an issue if determination of that issue is not necessary to enable the court to determine the outcome of the jurisdictional challenge”.⁵ The importance of the court’s existing case management powers was also recognised by the Court of Appeal in *Newcastle Express*, where Males LJ said at [16] that “[e]ven under the present law ... the court is not without case management powers in such a case to control the evidence adduced on any section 67 challenge”. In our view, the Law Commission’s suggestion that the court’s existing case management powers are insufficient is therefore misplaced. In practice, it is simply not the case that “if a challenge under section is a full rehearing, then the parties [will] be free to introduce whatever evidence they wish”. As the Law Commission itself recognises at §3.44 of the Second Consultation Paper, “the background trend since *Azov* suggests a reduced willingness by the courts to allow oral evidence in a challenge under section 67”. The evidence that will be permitted by the court will depend on the nature of the jurisdictional challenge that is being pursued.

14. **Fourth**, there is no need for any reform to prevent a party who has participated in the arbitration from raising new arguments or grounds of objection which it did not advance before the tribunal. That concern is already addressed by s.73(1)(a). Indeed, the Law Commission appears to recognise that this is the case at §3.104 of the Second Consultation Paper: “Under section 73, a failure to object promptly that the tribunal

⁵ Incidentally, Teare J also accepted in the same paragraph that the decision in *Dallah* established that “when a party issues a jurisdictional challenge pursuant to section 67 of the Arbitration Act 1996 that party is “entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court””.

lacks jurisdiction means a loss of the right to object later ... This should preclude an applicant under section 67 from raising before the court new grounds of objection which it could have raised before the tribunal". There is no basis for introducing a separate bar specific to s. 67 challenges (and in subsidiary rules of court, albeit introduced through a proposed gateway in primary legislation, i.e. the Act itself⁶), especially given the Law Commission's recognition that a body of case law has already developed under section 73.⁷

15. **Fifth**, in our view, the Law Commission has failed to take sufficient account of the position in other jurisdictions (which it dismisses in two short paragraphs at §§3.116-3.117 of the Second Consultation Paper). We addressed this issue at §11 of our First Response (by reference to the position in Canada, Australia, Singapore, Hong Kong and France). By contrast, the only example which the Law Commission has given of a jurisdiction which has taken a different approach is Switzerland (see at §3.117 of the Second Consultation Paper). Even then, the Law Commission notes that the Swiss approach has been the subject of criticism, and that it was criticised by some of the other consultees. We agree that the position adopted elsewhere "*cannot be decisive*" of the approach that should be taken in this jurisdiction. However, we would respectfully suggest that, where a proposed reform would (clearly) be out-of-step with the approach adopted in the majority of other major arbitral seats, particularly cogent reasons are required in order to justify such a radical departure. We do not consider that such reasons have been identified to date, and the Law Commission itself acknowledges that this is not the case, noting (at §3.125) that:

[It has] heard how reform could negatively impact the market, alternatively how no reform could negatively impact the market. Factually, it has not been possible for us to verify which prediction is more likely.

16. The Law Commission nonetheless concludes (in the same paragraph) that "*[a]s a matter of principle, we think that our proposals are merited*". In addition to the comments we

⁶ See §3.126 of the Second Consultation Paper.

⁷ See §3.114 of the Second Consultation Paper.

have made above as to the proposed reform not in fact being justified as a matter of principle, we respectfully submit that this is not a sound basis for altering this important area of the law. As noted in our First Response,⁸ there is now global competition between jurisdictions which market themselves, and which are perceived, as ‘safe seats’ for international arbitration such as London, Paris, Geneva and Singapore, and the law should not be changed to depart from the consensus reached in competing seats without a clear evidential basis.

17. **Sixth**, the Law Commission has made it clear that it does not intend to propose any equivalent reform to the standard of review under s.103. This means that the court will have to apply a different set of procedural rules (and in all likelihood a different standard of review) depending on whether it is dealing with (i) a challenge to jurisdiction under s.67; or (ii) the enforcement of a foreign award under s.103. In our view, there is no justification, as matter of principle, for such a difference of approach.
18. **Seventh and importantly**, the proposed reform is likely to have adverse and unintended consequences. In particular, if the proposed reform is implemented, then respondents could well be advised to keep their powder dry and to either (i) wait until after the tribunal has delivered its merits award to challenge jurisdiction under s.67; or (ii) to do so at the enforcement stage under s.103. If they do so, this is likely to result in additional delay and costs being incurred because the tribunal will have to go through the entire arbitration process before the respondent pursues its jurisdiction objections. In other words, the proposed reforms could well end up compounding the very problems which the Law Commission states that it is seeking to address through its reforms (i.e. delay and expense).
19. **Eighth**, we do not think it is necessary to amend the Arbitration Act to confer a power to make rules of court in relation (only) to the procedure to be adopted for jurisdiction challenges under s.67 (which is, as we understand it, what the Law Commission is currently proposing: see §3.129 of the Second Consultation Paper and Consultation Question 3). It is not clear to us from what is said in the Second Consultation Paper who the Law Commission is suggesting should make the proposed rules, or, indeed, which

⁸ At §4.

“rules of court” are being referred to. If what is being envisaged is an amendment to CPR r. 62.10 or Practice Direction 62, then this should be a matter for the Civil Procedure Rules Committee. There is no need for any statutory amendment to the Arbitration Act in order to confer the relevant rule-making power.

(C) Rationalisation of the avenues of challenge to jurisdiction under the Act

20. As we explained in Part C of our First Response, it is our respectful view,⁹ that the issues of potential waste of time and costs identified by the Law Commission would best be addressed by rationalising the avenues of challenge to jurisdiction under the Act in the following way:
- (a) Amending sections 9(1) and 9(4) to align the position in England and Wales with the position of all leading Model Law jurisdictions (including Singapore, Hong Kong and Canada) and avoid a full determination of issues of jurisdiction when a party seeks a stay of Court proceedings in favour of arbitration.
 - (b) Abrogating section 32.
 - (c) Abrogating section 72(1).
21. The Law Commission considers these issues at paragraphs 3.66 to 3.85 of the Second Consultation Paper and does not adopt those proposals. In our respectful submission, this would be a huge opportunity missed to make England and Wales a more competitive seat for international arbitration, and to send a powerful signal to international users (especially when coupled with the important proposed reform on applicable law now made by the Law Commission and addressed in Part (D) below) that our jurisdiction’s disposition is firmly *in favorem arbitrii*.
22. Starting with section 9, the Law Commission recognises in terms that “*the position under section 9 is admittedly complex*”.¹⁰ It would justify that complexity on the basis that “*it represents an interaction between the wording of section 9 itself, and use of the court’s*

⁹ As noted in our First Response, this part of our Response does not include Lord Mance.

¹⁰ See §3.79 of the Second Consultation Paper.

inherent jurisdiction. It is an example of an attempt to find a compromise between, on the one hand, the court considering the question of jurisdiction for itself, and up front, and on the other hand, ceding the first decision to the tribunal".¹¹ It notes that "[c]urrently ... when a party seeks a stay, the weight of case law indicates that they must prove, on the balance of probabilities, that there is an applicable arbitration agreement" and expresses the view that "it is open to the case law to move in [the] direction" of avoiding a full determination of the issue of jurisdiction on stay applications.¹² We respectfully disagree that these are valid reasons for avoiding taking legislative action, for the following reasons:

- (a) It is hardly consonant with England's status as a leading jurisdiction favouring arbitration to have a default rule pursuant to which a party opposing arbitration need only start Court proceedings to be assured that such objections to arbitral jurisdiction as it cares to make will be decided by the Court and not to by the arbitral tribunal. Such a default rule is directly inimical to the principle of competence competence, which is enshrined in s. 30 of the Act as rightly noted by the Law Commission. Under English law, as it currently stands, the rule is not that the arbitral tribunal will usually have priority, it is the converse. This is reflective of an attitude of mistrust towards arbitration which does not have its place in today's arbitration world, and which England should firmly abandon.

- (b) This is all the more striking given the Law Commission's open recognition, in the context of its own proposal with respect to s. 67 that "*a measure of deference to the tribunal can be justified. After all, arbitrators must be impartial. They must adopt procedures to resolve the dispute fairly. If not, an arbitrator can be removed by the court. And a serious irregularity which causes substantial injustice permits an award to be challenged. If instead, an impartial arbitrator, after a fair process, makes factual findings, that might well be a reason for deference. All the more so, perhaps, if the arbitrator is chosen by the parties or has conspicuous expertise.*"¹³ The English Courts currently shows no such deference when considering stay applications, and there is – once again – no basis for that anti-arbitration bias in a

¹¹ *Id.*

¹² See §3.76 of the Second Consultation Paper.

¹³ See §3.61 of the Second Consultation Paper.

modern international arbitration law. It is reflective of times past, and the present reform exercise should be used to consign it to history.

- (c) This is evident from the very careful, detailed comparative law analysis by the Singapore Court of Appeal in *Tomolugen Holdings*¹⁴ which notes that England is out of step with all other leading jurisdictions on this point. We noted this in our First Response and attached this important case thereto. It is disappointing to note that it is not referred to in the Second Consultation Paper, suggesting that it may not have received the attention it deserves. We would respectfully invite the Commission to consider this authority from one of the current leading State courts on international arbitration afresh. It makes the case for reform cogently; but the Singaporean jurisdiction may not mind if England does not listen and thereby maintains the competitive advantage Singapore (and other leading jurisdictions) currently enjoy in that respect.
- (d) Nor is it an answer to say, with respect, that “*it is open to the case law to move in that direction*”. *Al Naimi* has now stood for 23 years, and – as explained in our First Response – the language of sections 9(1) and 9(4) is such that there will be no change without legislative reform.
- (e) Nor is it an answer to say, with respect, that the Court retains case management flexibility to allow the issue to go first to the arbitral tribunal and that the current position constitutes “*a compromise between, on the one hand, the court considering the question of jurisdiction for itself, and up front, and on the other hand, ceding the first decision to the tribunal*”. As rightly noted by the Law Commission in its summary analysis of the principle of competence competence,¹⁵ the need to find the right balance between those two possibilities is inherent in the nature of competence competence – the search being for a solution which will be the most efficient in terms of time and costs. The current position under English law is that there is no clarity as to who goes first (court or tribunal), but that this issue falls to be argued out in every single case by reference to case management considerations. The Law Commission refers to the (largely aligned) solutions

¹⁴ [2015] SGCA 57 at para. 25-70.

¹⁵ See §3.54 to 3.65 of the Second Consultation Paper.

proposed by Prof. Gaillard and Prof. Park,¹⁶ but does not consider the extent to which they should be adopted in England and Wales.

- (f) The proposal contained in our First Response is aligned with the pragmatic solutions advocated by both of those very experienced arbitration practitioners. It would provide for a clear rule of priority in favour of arbitral tribunals while leaving clear and simple mechanisms for the court to go first when faced with a manifestly inapplicable or void arbitration clause.
23. As for section 32, the section is not being used in practice. It sends the wrong signal (in again suggesting a mistrust of arbitral tribunals determining their own jurisdiction) and should be abrogated.
24. Section 72(1) should similarly be abrogated, for the same reason of perception; and because it does in fact hand a trump card to parties who would avoid determination of issues of jurisdiction by the arbitral tribunal to seize the court of the same. The Law Commission states in response that “*a party cannot be forced to participate in an arbitration whose jurisdiction they refute, as has been acknowledged by the DAC, and by the Supreme Court in Dallah. So repealing section 72(1) would deny such a party any chance of challenging the arbitral proceedings prior to an award*”.¹⁷ This is, with respect, misconceived:
- (a) Repealing section 72(1) would not have that effect. We have not proposed repealing section 72(2) which expressly preserves the right of a non-participating party to challenge an arbitral award under sections 67 and 68 of the Act.
- (b) What section 72(1) does is entirely different: it gives the right to the recalcitrant party to force a situation where the court will go first (or at the very least in parallel to the arbitral tribunal) on issues of jurisdiction. As with section 9(4), this is directly inimical to the principle of competence competence, undermines the very rationale which the Law Commission states it wishes to promote in the current reform (viz. allow a degree of deference to arbitral tribunals), and there is no place for such a

¹⁶ See §3.60 and 3.62 of the Second Consultation Paper.

¹⁷ See §3.83 of the Second Consultation Paper.

rule in a modern international arbitration jurisdiction. We note, again, that England and Wales are alone in having such a rule.

25. The Law Commission’s overall conclusion on sections 9, 32 and 72 is that “*sections 9, 32 and 72 individually and cumulatively strike a balance which is defensible, and which does not call for legislative reform*”. We respectfully disagree, both as to substance (for the reasons set out above) and as to the approach adopted. The question ought not to be whether the current legislative scheme is “defensible” but whether it is promoting England and Wales as a jurisdiction of choice in international arbitration. For the reasons set out above, it is not. It is overly complex. It provides no certainty, with multiple options available to the parties to fight it out on the preliminary question of who decides issues of jurisdiction – court or tribunal. Its default bias is against the determination of issues of jurisdiction by arbitral tribunals, with the result that not much more than lip service is ultimately paid to the principle of competence competence enshrined in section 30. It is a hangover from another age, when courts would view arbitral tribunals with mistrust. It should be amended and a clear signal sent to international users that the proclivity in England and Wales – as in all other leading arbitral jurisdictions – is pro-arbitration, with clear and simple rules put in place to regulate the interaction between the courts and arbitral tribunals on issues of jurisdiction.
26. The Law Commission takes the view that arbitral tribunals should be accorded a degree of deference. We respectfully agree. As Lord Wilberforce noted during the parliamentary debates on the Arbitration Bill 27 years ago, arbitral tribunals are not and ought not to be treated as poor relations of the courts.¹⁸ That deference should be recognised by doing away with the mistrust for tribunals apparent from the manner in which the courts have interpreted section 9 of the Act and from sections 32 and (more importantly) 72(1) of the Act. The simplified regime we propose, allied to the already existing flexible regime for a *de novo* review of jurisdiction by the courts, will align England and Wales with competing arbitral seats such as Singapore, and send a powerful message to the market that England and Wales are on a par with those jurisdictions and able to act to correct their legal framework where required.

¹⁸ See Lord Wilberforce, Hansard, col 778, 18 January 1996, cited by Lord Steyn in *Lesotho Highlands* [2005] UKHL 43 at [18].

(D) Consultation Question 1: Law Applicable to the Arbitration Agreement

27. We are grateful to the Law Commission for having listened to the representations made formally in our First Response (and informally before that in other fora), and by numerous other consultees, regarding the law applicable to the arbitration agreement. For the reasons set out in our First Response, our answer to Consultation Question 1 is Yes. We further respectfully agree with the entirety of §2.77 of the Consultation Paper which we reproduce here for ease of reference:

*This proposed new rule, applying the law of the seat, has the virtues of simplicity and certainty. The law governing the matrix agreement would be irrelevant. Any doubt over which law governs the matrix agreement would not infect the question of which law governs the arbitration agreement. The new rule would apply whether the arbitration was seated in England and Wales, or elsewhere. It would apply whether the seat was chosen by the parties, or otherwise designated. Where the arbitration is seated in England and Wales, the new rule would avoid the problems which arise from *Enka v Chubb* – unless the parties explicitly agreed otherwise, in which case the parties must be taken as facing the consequences with eyes wide open. The ability to agree otherwise preserves party autonomy.*

28. In particular, we are of the view (as already expressed in our First Response¹⁹) that the application of the rule to all arbitrations (and not simply to arbitrations seated in England and Wales) is important. It will have the benefit of clarity and avoid further arguments as to the law applicable to the arbitration agreement in enforcement proceedings. It will put paid to any argument that the proposed rule in favour of the law of the seat is a parochial one in favour of English law. It will resolve problems such as those which arose in *Kabab-ji v Kout Food*²⁰, where – in relation to a French-seated arbitration – the English courts applied English law to the question of the validity of the arbitration clause (as being the implied choice of the parties as it was the applicable law of the main contract) rather than applying French law, resulting in different outcomes as to the validity of the award in England and in France.

¹⁹ At para. 66.
²⁰ [2021] UKSC 48.

29. We think it is significant and reassuring that the Supreme Court Justices who delivered the leading judgment in *Enka* have expressed support for possible reform in this area.²¹
30. We only add some responses to the possible arguments against the proposed reform summarised in §2.63 to 2.73 of the Second Consultation Paper. We note that those include the views of one consultee, and note in that respect that there were in fact numerous debates on this proposed reform in the lead up to the deadline for response to the First Consultation Paper, including at the Brick Court Conference referred to in our First Response. It is accordingly significant that, of all the submissions received by the Commission on this point, only one sought to argue against the proposed reform. Taking the points made in opposition in turn:
- (a) The first argument noted is that “*parties may have an expectation that the law they have chosen to govern their contract governs all the terms of their contract, including the arbitration clause*”. That is not our (cumulative) experience. Parties who choose a neutral and safe arbitral seat expect to receive the protection of the law of that arbitral seat for their arbitration, including on all the key issues addressed in the Second Consultation Paper (separability, arbitrability, scope and confidentiality).
- (b) The second argument noted is that “*if the law of the matrix contract and the law of the arbitration clause do not align, that can create problems. For example, it might lead to someone being held to be a party to the arbitration clause, under its governing law, and yet not a party to the matrix contract, under its different governing law*”. We do not see how that poses any difficulties, conceptually or in practice. The whole point of separability, for instance, is that a tribunal may determine – with jurisdiction – that the parties did not conclude a valid agreement. Similarly, there is no conceptual or practical difficulty with a tribunal concluding, with jurisdiction, that a party to the arbitration agreement is not a party to the matrix contract. Conversely, where a party is found not to be a party to the arbitration agreement, that will be the end of the analysis. There will be no jurisdiction to determine the subsequent question of whether that party could be a party to the

²¹ See §2.73 of the Second Consultation Paper.

matrix contract. We do not think this is a serious argument against the proposed reform.

- (c) The third argument noted is that “*to the extent that the matrix contract is governed by foreign law, evidence of that foreign law will be before the tribunal or court anyway. The fact that the arbitration clause might need evidence of that same foreign law will therefore add little extra cost or delay*”. This appears to be based on a misunderstanding. The issues of law which will arise in relation to the arbitration agreement will be issues of arbitration law (e.g. regarding separability, arbitrability, scope, confidentiality). There will rarely be overlap with issues arising in relation to the matrix contract. We again do not think this is a serious argument against the proposed reform.
- (d) The fourth argument noted is that “*the supposed complexities around section 4(5) are surmountable. To the extent that any inquiry at all will need to be made, as to whether any given section of the Act is disapplied by the choice of foreign law, guidance has already been provided by the Supreme Court in Enka v Chubb*”. We respectfully disagree for the reasons set out in para. 56-59 of our First Response. The comments made by the Supreme court in *Enka* on that point were *obiter*, suffer (with respect) from internal tensions and potential misconceptions which would have to be argued out in the courts, and only address a handful of the numerous problematic statutory provisions. What is more, the procedure v substance complexities created by *Enka*’s interpretation of section 4(5) are only one part of the larger picture addressed in our First Response and now addressed by the Law Commission in the Second Consultation Paper.
- (e) As for the further argument noted by the Law Commission on public policy limitations, we respectfully agree with the answer provided by the Law Commission in §§2.70 to 2.72 of the Second Consultation Paper. We would add that, in our experience, parties choose a seat in a safe jurisdiction – such as England and Wales – precisely because of the potential for the misuse of foreign public policy as a tool to invalidate the parties’ agreement to arbitrate. We give an example of this in para. 53(a) and footnotes 36 and 37 of our First Response. In other words (i) English law does indeed have limitations to the parties’ freedom to arbitrate; and (ii) those limitations are more likely to operate fairly and neutrally in

any given case than the limitations imposed by another State which may itself have an interest (direct or indirect) in the dispute. And as noted by the Law Commission that State's limitations will remain in place when it comes to enforcement of any award in its jurisdiction.

London, 26 May 2023

Annex 1

Further members of Brick Court Chambers referred in paragraph 1

Sir Gerald Barling

Craig Morrison KC

Sir Paul Walker

Georgina Petrova

Simon Thorley KC

Jonathan Scott

Richard Lord KC

Charlotte Thomas

Fionn Pilbrow KC

Sarah Bousfield

Klaus Reichert SC